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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM, etc., Plaintiff, v. SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE, et al., Defendants. AND OTHER RELATED ACTIONS	Case No. GIC841845 [Consolidated with Cases No. GIC851286 and GIC 852100] CITY'S OBJECTIONS TO PROPOSED STATEMENT OF DECISION; REQUEST FOR RESOLUTION OF CONTROVERTED ISSUES; AND REQUEST FOR RELATED HEARING [CCP §§ 632, 634 AND CRC § 232(d)] I/C Judge: Hon. Jeffrey B. Barton Dept.: 69 Action filed: January 27, 2005 Trial: October 30, 2006

The City of San Diego ("City"), and Intervenors requested the Court issue a statement of decision under CCP § 632 and both submitted a proposed statement of decision. The City, pursuant to California Code of Civil Procedure ("CCP") §§ 632, 634 and California Rules of Court § 232(d), objects to the Proposed Statement of Decision adopted by the Court because the Proposed Statement of Decision does not resolve principal controverted issues or because it does

so incorrectly or ambiguously. When requested under CCP § 632 the trial court must issue a statement of decision that meets the statutory requirements and issuance of an insufficient statement has been held to constitute reversible error *per se*. *Miramar Hotel Corp. v. Frank B. Hall & Co*. (1985) 163 Cal. App. 3d 1126, 1129.

The City brings these omissions, ambiguities or errors to the trial court's attention under CCP §§ 632, 634 and CRC § 232(d) prior to entry of judgment so that if the omissions or ambiguities are not resolved by the trial, the reviewing court will not infer that the trial court decided in favor of the opposing parties as to those facts or that the City failed to object or request that the court resolve these issues.

As the Court rules on the City's objections and requests for resolutions of principal controverted issues, the City respectfully asks the Court to be mindful of the clear and unambiguous directive of the controlling authority of *Carson Redev. Agency v. Padilla* (2006) 140 Cal. App. 4th 1323, 1336-1337:

> To construe the statute narrowly would permit certain categories of schemes and improprieties to go unchecked, a result which would undermine the public's confidence not only in the government, but in the court system ruling on such cases. An important, prophylactic statute such as section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled.
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> Our holding sends a message. If a corrupt public official demands an extortion payment in exchange for a public contract, the victim should not pay. Instead, the victim should report the corrupt public official to local, state or federal law enforcement. If the victim pays and the extortion is discovered, the victim will not be permitted to retain any consideration received. The reason is simple. A public contract obtained through an extortion payment is not valid, and no one should believe that it is valid. A bright line rule is required.

The City respectfully requests the Court schedule a hearing to resolve the issues raised in this pleading.

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A. Controverted Issues Brought to Trial Court's Attention[1]

1. GENERAL

1. The Court did not resolve directly the controverted issue of whether Manager's Proposal 1 ("MP-1") and Manager's Proposal 2 ("MP-2") benefits granted in violation of Gov't Code § 1090 could be incorporated in new MOUs or ratified by the 1998 MOUs, the *Corbett* agreements or the *Gleason* agreement without full disclosure of the facts, exclusion of City officials and City employees with prohibited financial interests and a new vote.[2]

Therefore, the City requests the Court to resolve whether any agreement or legislative act could ratify or otherwise remove the underlying violations of Gov't Code § 1090 without full disclosure, removing financially interested City officials and City employees and a new vote. The City requests the Court resolve this issue under the binding legal authority of *Downey Venture v. LMI Ins. Co*. (1998) 66 Cal. App. 4th 478, 511 ("An illegal contract is void; it cannot be ratified by any subsequent act, 'and no person can be estopped to deny its validity'"); *Berka v. Woodward* (1899) 125 Cal. App. 119, 129 (the fact that claim was allowed by the council did not give it validity that it did not otherwise possess; contract based on conflict of interest was void); *Schaefer v. Berinstein* (1956) 140 Cal. App. 2d 278, 289-93 (upon violation of Section 1090, city council had duty to declare resulting action void); *City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal. 2d 267, 274 ("A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his right to urge that defense"); *Fewell & Dawes, Inc. v. Pratt* (1941) 17 Cal. 2d 85, 91 ("An illegal contract cannot be ratified, and no person can be estopped from denying its validity.")

See also, 1 Witkin, Summary of California Law, Contracts § 432 (2006) ("Because an illegal contract is void, it cannot be ratified by any subsequent act and no person can be estopped to deny its validity"); 17A Am Jur. 2d Contracts § 308 ("A contract that is void as against public policy or statute cannot be made valid by ratification"); 10A McQuillin on Municipal

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[1] C.C.P. §§ 632, 634 and California Rules of Court § 232(d)

[2] The Court in error ruled that the benefits were included

Corporations § 29.104.30 ("Contracts which a municipal corporation are not permitted legally to enter into are not subject to ratification"; no ratification of contract that is contrary to declared public policy); 64 CJS Municipal Corporations § 914 ("A municipal contract which is void in its inception is not validated by performance but remains a void contract.") Indeed, the municipality may avoid performance even though the other party has performed: "Where the municipality fails to comply with a statute, and the purpose of the statute is to protect taxpayers rather than the municipality, equity may not be invoked to enforce an agreement against the municipality. . . . [M]unicipal contracts involving in their execution or enforcement a violation of public policy are void." *Id.*; *see also id*. at § 915 (an ultra vires or illegal contract is not susceptible of validation).[3]

2. The City objects to the Court's incorrect resolution of the controverted issues of whether *Corbett* or *Gleason* bars the City's claims as revealed by the Court's inconsistent findings. The Court found that both *Corbett* and *Gleason* bar the City's claims. In ruling against the City, under *Gleason*, the Court cited the City's purported position that MP-1 (which occurred in 1996) and MP-2 (which occurred in 2002) were a single transaction:

> Because the City reaches the benefits as a legal matter only through its allegations that they constitute a "single transaction" with the MP-1 and MP-2 funding agreements and are, therefore, void *ab initio*, and/or that the benefits as a whole violate debt liability limits, the City is bound by the principles of *res judicata* and the claims against the *Gleason I* class members are barred as a matter of law. All issues which were or could have been litigated in *Gleason* were merged in the settlement and judgment and are conclusive as to this action.[4] [emphasis added]

On the other hand, in barring the City's claims under *Corbett*, the Court found the 96-97 MOUs granting the MP-1 benefits were no longer in effect by 1998:

> The 96-97 MP-1 MOUs were no longer in effect at the time of the *Corbett* judgment. They had been supplanted by the 1998 MOUs. The 96-97 MOUs are the ones alleged to be tainted by the improper vote by interested Directors of SDCERS on contribution relief.[5]

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[3] The City requests the Court find that the only way for the prior actions to be ratified is for the Court to remand to the City Council for new proceedings free of the invalidating conflict, as discussed, *infra*.

[4] Proposed Statement of Decision, p. 32.

[5] Proposed Statement of Decision, p. 20 fn 2.

In reaching these inconsistent findings, the Court misstated the City's contentions. The City contends that the MP-1 benefits were created in violation of Gov't Code § 1090 by the adoption of MP-1 and the MP-2 benefits were created in violation of Gov't Code § 1090 by the adoption of MP-2. The MOUs were only some of the related agreements adopted by the City in connection with MP-1 and MP-2. The City further contends that the Gov't Code § 1090 violation attached to the benefits granted under MP-1 and MP-2 and that those violations could not be corrected, nor the benefits granted or extended, without full disclosure of the relevant facts, exclusion of the financially interested City officials and a new vote. Therefore, the City requests the Court correct its Proposed Statement of Decision by correctly stating the City's position that the violations of Gov't Code § 1090 attached to the MP-1 and MP-2 benefits and that the violations could not be corrected without full disclosure of the relevant facts, exclusion of the financially interested City officials and a new vote.[6]

2. *CORBETT*

3. The Court did not resolve the controverted issue whether MP-1 benefits were automatically disgorged because they were granted in violation of Gov't Code §§ 1090 and 1092. Therefore, the City objects and requests the Court resolve the controverted issue of whether the MP-1 benefits were automatically disgorged under the binding legal authority of Gov't Code §§ 1090, 1092; San Diego City Charter ("Charter") § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572; *People v. Honig* (1996) 48 Cal.App.4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323.

Specifically, the City requests the Court to follow the holding of *Carson* in which the *Carson* court found that <u>disgorgement is automatic</u>:

> However, *Thomson* gave its imprimatur to a long line of cases applying that remedy, and it approved that remedy against Call. *Thomson* considered a flexible rule, but then decided against it for policy reasons after considering the unacceptable ramifications of such a rule. More recently, *Finnegan* held that a public entity is entitled to recover any compensation it paid under a tainted contract without restoring any of the benefits it received. (Finnegan, supra, 91 Cal. App. 4th at p. 583.) By logical import, *Finnegan* interpreted *Thomson* as a

[6] *See* City's Proposed Statement of Decision 64:7-21, including footnote 20.

> binding precedent holding that the disgorgement remedy is automatic. For policy reasons, we follow the lead of *Finnegan*. We do so for two reasons. Based on stare decisis, we pay deference to the long history of consistent appellate case law recognized in *Thomson*. Also, as a policy matter, it is the most effective way to give *section 1090* all the teeth that it needs.

4. The Court erred when it dismissed the City's Gov't Code § 1090 MP-1 claim. MP-1 consisted of a series of contracts and legislative actions in which City officials and employees exchanged benefits for underfunding the pension plan. The City's Gov't Code § 1090 MP-1 claim was not limited to any one MOU but to the transaction as a whole.

In dismissing the City's Gov't Code § 1090 MP-1 claim the Court applied technical contract rules not the rules governing the conduct of public officials the Legislature sought to regulate under Gov't Code § 1090:

> Each MOU is a stand along agreement under the MMBA. While terms from the old MOU can be incorporated in the new MOU, the contract between the parties then becomes the new MOU. The grant of benefits by the City to its employees challenged by the City as part of MP 1 were no longer in effect (except for those who retired under MP 1) since the new 1998 MOUs were in effect by the time the Corbett judgment was entered. The City cites no authority for the proposition that the continuation of an earlier benefit from a previous MOU that is incorporated in a new MOU after a new round of the meet and confer process under the MMBA can be set aside based on a Gov. Code § 1090 violation affecting the earlier agreement but not the current one.[7]

Therefore, the City requests the Court correct its Proposed Statement of Decision by deciding whether *Corbett* estops the City's Gov't Code § 1090 MP-1 claim. The City requests that the Court analyze the conduct of the public officials involved in making all of the related agreements under MP-1 and *Corbett* as directed under the binding authority of *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323, 1333 and *People v. Honig* (1996) 48 Cal. App. 4th 289, 314. The cases provide "the Legislature was not concerned with the technical terms and the rules of making contracts but instead sought to establish <u>rules governing the conduct of governmental officials</u>.

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[7] Proposed Statement of Decision p. 20 n.2.

Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose."[8]

5. The Court did not resolve whether or assume for purposes of Phase I that City officials who made the MP-1 agreement had a direct or indirect financial interest in MP-1. Therefore, the City objects and requests the Court resolve the controverted issue of whether any participating City officials had a direct or indirect financial interest in MP-1.

6. The Court did not resolve the controverted issue of whether a City public official or City employee who violated Gov't Code § 1090 or Charter § 94 in connection with MP-1 could thereafter participate in the making of the 1998 MOUs or related Corbett agreements and judgment and thereby establish a legal basis to estop the disgorgement of MP-1 benefits under the binding legal authority of Gov't Code §§ 1090, 1092; Charter § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572; *People v. Honig* (1996) 48 Cal.App.4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323. Therefore the City requests the court to resolve the controverted issue of whether a City public official or City employee who violated Gov't Code § 1090 or Charter § 94 in connection with MP-1 could thereafter participate in the making of the 1998 MOUs or related *Corbett* agreements and judgment and thereby establish a legal basis to estop the disgorging of the MP-1 benefits under the binding legal authority Gov't Code §§ 1090 and 1092; Charter § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572; *People v. Honig* (1996) 48 Cal.App.4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323.

7. The Court erred when it assumed that the City was asked to list the 1998 MOU agreement in response to Interrogatory No. 83 (Exhibit 1250 p. 4)[9] when, in fact, the interrogatory asked for a list of the illegal benefits by "ordinance" not by "agreement" as the Court found. Therefore, the City requests that the Court correct its error by finding that

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[8] On page 20 n. 2 of the Proposed Statement of Decision, the Court stated, "[t]he 96-97 MP-1 MOUs were no longer in effect at the time of the *Corbett* judgment."

[9] Proposed Statement of Decision p. 20 n 2.

Intervenors' Interrogatory No. 83 (Exhibit 1250 p. 4) asked the City to list the challenged benefits by "ordinance" and not by "agreement."[10]

8. The Court erred when it found the City's grant of benefits under MP-1, challenged by the City under Gov't Code § 1090, were no longer in effect upon the consummation of the 1998 MOUs. In fact, the 1998 MOUs expressly incorporated the 1997 ordinances granting the MP-1 benefits which the City noted in its response to the Intervenors' interrogatories Intervenors' Interrogatory No. 83 (Exhibit 1250 p. 4).[11]

Therefore, the City requests the Court find that the 1998 MOUs provided in pertinent part as follows:

> 1997 Benefit Changes
> The City and (name of union), having met and conferred, have agreed to benefit improvements to the City Employees Retirement System, The City Council has approved these changes by adoption of Ordinance No. O-18383 Adopted February 25, 1997, and Ordinance No. O-18392 Adopted March 31, 1997; subsequently the improvements were approved by a majority vote of the System Members in April 1997.[12] [emphasis added]

9. The Court did not resolve the controverted issue of whether the City identified the two ordinances identified in the 1998 MOUs as granting the MP-1 benefits in response to Interrogatory No. 83 (Exhibit 1250 p. 4). Therefore, the City requests the Court resolve the controverted issue of whether the City identified Ordinance Nos. O-18383 and O-18392 as void under Gov't Code § 1090 in the City's Response to Interrogatory No. 83 (Exhibit 1250 p. 4).[13]

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[10] Proposed Statement of Decision p. 20 n 2.

[11] Again, the court's analysis subverts the substantive application of rules of conduct governing City officials to a technical application of contract rules which is contrary the analysis mandated by the controlling authority cited by the City in this pleading.

[12] See Exhibits 1117.23, 1120.16, 1124.29; compare the language in the MOUs that the benefits were created under the 1997 ordinances with the assertion in the Statement of Decision that "The 96-97 MOUs were no longer in effect at the time of the Corbett judgment." [Proposed Statement of Decision p. 2 fn2.] The benefits were granted effective 1997 and the later MOUs continued to incorporate by reference and to rely upon the 1997 ordinances. Those ordinances were identified in the City's interrogatory answers as targets of the City's claims.

[13] In addition, the City also has served a Supplemental Response to Interrogatory No. 83 further clarifying that the 1998 MOUs incorporated the 1997 ordinances.

10. The Court did not resolve the controverted issue of whether Bruce Herring had a financial interest in MP-1 and MP-2 while participating in the making of those agreements and whether he also participated in the making of the *Corbett* settlement and *Corbett*-related MOUs. Therefore, the City respectfully requests the Court resolve the controverted issue of whether Bruce Herring had a financial interest in MP-1 and MP-2 while participating in the making of those agreements and also whether he participated in the making of the *Corbett* settlement and *Corbett*-related MOUs.

11. The Court did not resolve the controverted issue of how a Gov't Code § 1090 violation could be corrected. Therefore, the City requests the Court include in its statement of decision that any MP-1 violation of Gov't Code § 1090 can be corrected only if the parties with prohibited financial interests do not participate, full disclosure of the facts material to the violation are disclosed and a new vote is taken.

12. The Court erred in finding that the City was required to assert the MP-1 Gov't Code § 1090 claim in *Corbett* based upon *Spray, Gould & Bowers v. Associated Int. Ins. Co.* (1999) 71 Cal. App. 4th 1260. The *Spray* case found a "duty to speak" was created under a specific insurance regulation that governs insurance companies, not cities. *Id*. at 1267.

The insurance regulation applicable in *Spray* does not apply to the City. Further, the Proposed Statement of Decision states that the plaintiffs in *Corbett* challenged "the method by which pension benefits were calculated because they did not include benefits the California Supreme Court had ordered Ventura County to include in pension calculations."[14]

The City's Gov't Code § 1090 claims did not arise out of the *Ventura* case but from the misconduct of government officials, many of whom were still involved in making the *Corbett* related agreements. Therefore, the City requests the Court correct the error of relying on an insurance regulation case based upon an insurance regulation that created a duty to speak for an insurance company is not applicable to the City. Instead, the City requests the Court find that the City was not required to assert its Gov't Code § 1090 claims in the *Corbett* case, especially when

[14] Proposed Statement of Decision 4:13-18

the City was still under the domination of the alleged wrongdoers. *See Schaefer v. Berstein* (1956) 140 Cal. App. 2d 278; *Whitten v. Dabney* (1916) 171 Cal. 621; *City of Oakland v. Carpentier* (1859) 13 Cal. 540 (claims did not run until after corporation thus defrauded got out of hands of the confederates).

13. The Court erred when it found that "if the City's interpretation of *Corbett* is correct, one would have to postulate that the parties agreed upon increases of 7% and 10% with no reference point."[15] This is a non-sequitur. The City's position is that the math from *Corbett* can be used without keeping the illegal MP-1 benefits.[16] The City's position is that the parties agreeing to *Corbett,* including key players who had violated Gov't Code § 1090 in connection with MP-1 were involved (e.g. Bruce Herring) in making the *Corbett* agreements and they chose not to raise or resolve the Gov't Code §1090 claims. The City contends that these participating parties could not cure, waive or ratify the Gov't Code § 1090 claims because they were still financially interested. The City's position advances the policies underlying Gov't Code § 1090 and is consistent with the following controlling authorities: Gov't Code §§ 1090, 1092; Charter § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal App. 4th 572; *People v. Honig* (1996) 48 Cal. App. 4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323.

3. NECESSARY PARTIES

14. The City objects to the implied finding of the Court that whenever automatic disgorgement is applied, all parties affected by the prospective application of the automatic disgorgement rule are indispensable parties who must be joined in the action before the automatic disgorgement rule can be invoked. Therefore, the City requests the Court correct its ruling and find that all parties affected by the prospective application of the automatic

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[15] Proposed Statement of Decision 18:19-24.

[16] A simple way to enforce the City's position would be to calculate the benefits under the Corbett formula and then back out the illegal benefits granted under MP-1. This can be done with a simple algebraic formula. You can do the math using *Corbett* without keeping the illegal benefits of MP-1.

disgorgement rule are not indispensable parties who must be joined in the action before the automatic disgorgement rule can be invoked and that the Court follow the binding legal authorities of: Gov't Code §§ 1090, 1092; Charter § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572; *People v. Honig* (1996) 48 Cal. App. 4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323.

4. DEBT LIMIT LAW

15. The Court did not resolve the controverted issue of whether City officials who participated in the making of public contracts and related legislative action that created pension debt under MP-1 or MP-2 without providing for same-year revenues violated California Constitution Art. XVI, § 18 and Charter § 99. Therefore, the City requests the Court resolve the controverted issue of whether City officials who participated in the making of public contracts and related legislative action that created pension debt under MP-1 or MP-2 without providing for same-year revenues violated California Constitution Art. XVI, § 18 and Charter § 99.

16. The Court erred when it found any violation of the debt limit law caused by the creation of unfunded pension debt by MP-1 and MP-2 was cured by the *Gleason* settlement. The debt limit violations occurred in 1996 and 2002 because MP-1 and MP-2 granted benefits retroactively with no same-year funding and forward without providing same-year funding in the future. The *Gleason* settlement provided for the City to pay even more money than under MP-1 and MP-2. Thus, the *Gleason* settlement did not cure the debt limit violation but made it worse. The dispute between SDCERS and the City is over whether the debt limit law was violated by any City official such that the debt created by MP-1 and MP-2, which SDCERS seeks to enforce every year by sending a bill to the City that includes the alleged illegal debt, is not enforceable and the City contends it therefore does not have to pay the debt to SDCERS. Therefore, the City respectfully requests that the Court correct its error and find that the question is not whether SDCERS violated the debt limit law, but whether any City official violated the debt limit law so

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that those portions of the MP-1 and MP-2 benefits created in violation of the debt limit law cannot be enforced against the City.[17]

5. *GLEASON*

17. The Court did not resolve the controverted issue of whether those who violated Gov't Code § 1090 for having participated in the creation of MP-1 or MP-2 (e.g. Bruce Herring) also participated in making the *Gleason*-related agreements. Therefore, the City requests that the Court resolve the controverted issue of whether those who violated Gov't Code § 1090 for having participated in the creation of MP-1 or MP-2 (e.g. Bruce Herring) also participated in making the *Gleason*-related agreements. The City requests that the Court follow the binding legal authorities of: Gov't Code §§ 1090, 1092; Charter § 94; *Thomson v. Call* (1985) 38 Cal. App. 3d 633; *Finnegan v. Schrader* (2001) 91 Cal. App. 4th 572; *People v. Honig* (1996) 48 Cal. App. 4th 289; and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323.

18. The City objects to the Court's implied finding that a public official who violated Gov't Code §1090 in connection with MP-1 and MP-2 could thereafter participate in making the *Gleason* settlement and thereby create a legal basis to estop the City from voiding the MP-1 and MP-2 benefits. The City, therefore, requests that the Court correct the error, find that the *Gleason* settlement and related agreements did not remove or negate any Gov't Code § 1090 violation associated with MP-1 and MP-2 as asserted by the City, and find that *Gleason* therefore does not estop the City's Gov't Code § 1090 claims.

19. The City objects to application of the rules for making contracts the Court used to resolve whether *Gleason* estopped the City's MP-1 Gov't Code § 1090 claims rather than the rules governing the conduct of public officials the legislature sought to regulate under Gov't Code § 1090. Therefore, the City requests the Court to correct its Proposed Statement of Decision by deciding whether *Gleason* estops the City's Gov't Code § 1090 MP-1 related claims by analyzing the conduct of the public officials involved in making all of the related agreements under MP-1 and MP-2 and *Gleason*, as directed by the binding legal authority of

[17] Proposed Statement of Decision 28:26-29:4.

Thomson v. Call (1985) 38 Cal. App. 3d 633 and *Carson v. Padilla* (2006) 140 Cal. App. 4th 1323, which provide: "the Legislature was not concerned with the technical terms and the rules of making contracts but instead sought to establish rules governing the conduct of governmental officials. Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose."[18]

20. The Court did not specifically resolve that the City was specifically required to bring a cross-complaint against SDCERS, a cross-defendant in the *Gleason* case. The City objects and requests the Court resolve the controverted issue by finding the City was not required to assert a cross-complaint against SDCERS because CCP § 426.30(a) provides that cross-complaints only have to be filed against the plaintiff. *See* CCP § 426.30(a) (cross-complaint has to be filed "against the plaintiff"); *Atherley v. MacDonald, Young & Nelson, Inc.* (1955) 135 Cap. App. 2d 383, 385 (cross-complaint not compulsory between cross-defendants); *Am. Bankers Ins. Co., v. Avco-Lycoming Div.,* (1979) 97 Cal. App. 3d 732, 735; *Russo v. Scrambler Motorcycles* (1976) 56 Cal. App. 3d 112, 118.

21. The Court did not resolve the controverted issue whether those who participated in the decision to not assert a claim under Gov't Code § 1090 in the *Gleason* case had violated Gov't Code § 1090 in connection with MP-1 and MP-2 (*e.g.* Bruce Herring). Therefore, the City requests that this Court resolve this issue under the controlling authority of *Schaefer v. Berstein* (1956) 140 Cal. App. 2d 278; *Whitten v. Dabney* (1916) 171 Cal. 621; *City of Oakland v. Carpentier* (1859) 13 Cal. 540 (claims did not run until after corporation thus defrauded got out of hands of the confederates).

B. Additional Requests and Objections Brought to the Trial Court's Attention

22. The Court found the City's outside counsel approved MP-1 thereby creating an ambiguity about whether the Court found that legal advice was a defense to a Gov't Code § 1090

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[18] On page 20, footnote 2, of the Proposed Statement of Decision, the Court stated, "the 96-97 MP-1 MOUs were no longer in effect at the time of the *Corbett* judgment."

claim.[19] Therefore, the City requests the Court resolve this ambiguity by finding that advice of counsel is not a legal defense to a Gov't Code § 1090 violation under the binding legal authority of *Chapman v. Superior Court* (2005) 130 Cal. App. 4th 261, 274.

23. The Court erred when it found SDCERS' fiduciary counsel had approved MP-1.[20] The legal counsel actually advised the SDCERS board in his 19 September 1996 letter as follows:

> Ms. Parode also asked questions at the public hearing concerning the Board's duty to determine the financial stability and viability of the City when the Board is asked to approve an action by the City that would increase the unfunded liability of the City. Following up on this questions, you letter of July 29, 1996, asked us whether the Board has a duty to determine the financial viability of the City before it approves contribution payments at a letter less than that recommended by the actuary. In our opinion, the Board does have responsibility.
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> Ms. Parode, in her comments at the June 21, 1996, public hearing on the City Manager's proposal, compared the approval of employer contribution payments at a level less than that recommended by the actuary to that of a retirement system loaning money to an employer. Before a bank makes a loan, it has the duty to determine the ability of the borrower to repay it. We believe that the Board is held to the standard of professional bankers and bank investment advisors. If a pension fund is asked to approve employer contribution payments at a level less than the amounts recommended by the actuary, because of the unfunded liability created, the fiduciary must determine the ability of the employer to provide the funds to deliver benefits and related services to the participants and their beneficiaries when they become payable.
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> To discharge the duty of determining the ability of the City to provide the funds to deliver benefits and related services to participants and their beneficiaries, the Board should give appropriate consideration to the audited financial statements of the City; determine whether the City is reasonably carrying out and performing the municipal services required of it by the City Charter; determine whether it establishes a budget each fiscal year that anticipates the expenditures for those mandated services and the revenue necessary to fund them from a reasonable level of taxation, state aid, and other funds; and determine whether the City is paying its debts as they become due and is doing so without stress. In making its analysis the Board may need the advice and counsel of an expert who has extensive experience in municipal finance and government. Failure to carry out such an evaluation would be a breach of the duty of the Board to administer the system in a manner that will insure prompt delivery of benefits and related

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[19] The Proposed Statement of Decision states, "[a] number of meetings ensued where the proposal was presented, discussed and approvals obtained by the City's outside fiduciary counsel Jones Day, along with SDCERS' fiduciary counsel and actuary. Legal advice was obtained which, in part, reflected that under the *Claypool* case, the Board could consider benefit improvements and expense to the employer as factors in the total circumstances surrounding the Managers Proposal." [8:24-9:7].

[20] Proposed Statement of Decision 9:1-4.

services to the participants and their beneficiaries as required by Article XVI, § 17(a) of the California Constitution.[21]

In fact, the SDCERS board failed to evaluate the City's ability to pay under the terms of the MP-1 agreement.[22] Therefore, the City requests the Court correct its finding and instead find that the approval of SDCERS outside counsel was given conditionally but that SDCERS did not satisfy the condition because it failed to determine the City's ability to make the payments called for under MP-1.

24. The Court erred when it found "no evidence was submitted that SDCERS was involved in any way in negotiation of [the 1998] MOUs and no evidence was received concerning any allegation of a Government Code section 1090 violation in the passage of these MOUs."[23] The Court's statement does not correctly reflect the evidence presented at trial. Evidence was presented that the 1998 MOUs merely incorporated the 1997 Benefit Changes.[24] Additionally, the evidence revealed that individuals on the SDCERS' Board who participated in MP-1 also participated in the making of the 1998 MOUs (*e.g.*, Bruce Herring, Ron Saathoff). Therefore, the City requests the Court correct the Proposed Statement of Decision and instead find that City officials or employees who participated in the making of MP-1 while holding financial interests therein in violation of Gov't Code § 1090 (*e.g.* Bruce Herring, Ron Saathoff) also participated in the making of the 1998 MOUs.

25. Objection is made to the Proposed Statement of Decision because it inaccurately states "[a]s a result of a declining market following 9-11 and the dot com market collapse, investment returns on the pension trust assets were at the lowest point in many years."[25] The

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[21] *See* Exhibit 84.3-4.

[22] *See* Exhibit 55.12.

[23] Proposed Statement of Decision 9:23-25.

[24] The City and (name of union), having met and conferred, have agreed to benefit improvements to the City Employees Retirement System, The City Council has approved these changes by adoption of Ordinance No. O-18383 Adopted February 25, 1997 and Ordinance No. O-18392 Adopted March 31, 1997; subsequently the improvements were approved by a majority vote of the System Members in April 1997. [See Exhibits 1117.23, 1120.16, 1124.29]

[25] Proposed Statement of Decision 12:14-17.

Court's statement does not correctly reflect the evidence presented at trial. Evidence was presented that the "[s]ubstantial benefit improvements granted by the City since the adoption of the 'City Manager's Retirement Proposal' dated July 23, 1996 (Manager's Proposal) have created additional unfunded liability to SDCERS that was not anticipated when the City agreed to the 'trigger' provisions." [26] Therefore, the City requests the Court correct the Proposed Statement of Decision and correct this error.

26. Objection is made to the Proposed Statement of Decision because it inaccurately states:

> In 1996, then City Manager Jack McGrory developed a plan to raise pension benefits while at the same time reducing the amount the City paid into the pension system to a level below the actuarially required level. The plan arose because the City was faced with a need to renew expiring labor agreements with its employees **at the same time the City's obligation to contribute to the pension plan increased by an unanticipated $25 million**. (emphasis added)[27]

In fact, the $25 million figure was used in connection with the amount estimated by some City officials as the sum the City would need to pay if the trigger were hit in 2002.[28]

27. The City objects and requests the Court correct the statement in the Proposed Statement of Decision that the City proposed "appointing a special master to do the fact finding and make decisions or recommendations."[29] The City's "remedy would be to declare the illegal official actions – including MP-1 and MP-2 and all inextricably related contractual and legislative actions – to be void, and to issue a writ of mandamus remanding the matter to the City

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[26] See Exhibits 272.2, 274.3 and 311.2.

[27] Proposed Statement of Decision 6:26-7:4.

[28] Exhibit 276.226 "Ms. Lexin said her understanding is that the City is before this Board with this request because of projections that Mr. Roeder just confirmed; that there was a good chance we would hit the floor; and that the City would be faced with a $25 million hit to next year's budget."

[29] Proposed Statement of Decision 36:6-7.

Council for new proceedings cured of the invalidating conflict."[30] The special master was proposed solely to assist the Court with "the mathematical and accounting complexities."[31]

28. For purposes of Phase One, a Gov't Code § 1090 violation was to be presumed. Objection is made to the Proposed Statement of Decision because the Court bases its decision on a finding that no Gov't Code § 1090 violation occurred.[32] This decision of the Court precluded the City from presenting evidence of a Gov't Code § 1090 violation.

C. SPECIFIC OBJECTIONS TO DECISION

The City hereby objects and requests the Court correct, resolve and/or clarify the following statements (identified by page and line numbers) in the Court's Proposed Statement of Decision:

29. Page 2:5-7: The compulsory cross-complaint filed by SDCERS should be included in the list of pleadings.

30. Page 3:22-23: What are the "previous inconsistent positions taken by the City during several significant intervening events" and how are those positions "inconsistent" with the City's position in this case?

31. Page 3:24-27: Were the "original 1996 benefits" "renegotiated several times between the City and the City's employees represented by labor groups as documented by various superseding Memorandum of Understandings (MOUs)," or did subsequent MOUs increase existing benefits bestowed in 1996 under MP-1?

32. Page 4:1-2: What are the "several lawsuits challenging aspects of what are now called MP-1 and MP-2" which "have settled, and have become judgments that are binding on the City . . . ."?

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[30] City's Proposed Statement of Decision 72:25-73:2.

[31] City's Proposed Statement of Decision 71:17-19.

[32] Proposed Statement of Decision 20 fn. 2.

33. Page 4:4-5: In referring to "[t]he City's longstanding approach of not challenging the benefits," is the Court making a finding that the City discovered or should have discovered the violations of conflict of interest or debt limit laws at a particular time?

34. Page 4:7: What were the City's "intervening actions, and inaction, before 2005"?

35. Page 4:7-8: Is the Court making any finding regarding whether Gov't Code § 1090 was violated or only "the procedural impact of these past actions by the City which are not consistent with the City's legal position in the current litigation"?

36. Page 4:11-12: Did the City fail to act when it had a duty to act, and, if so, what was the source of the duty to act and what was the failure to do so?

37. Page 5:2-3: Were the MP-1 benefits "replaced by the City's creation of benefits for all pension participants in the *Corbett* judgment" or were the MP-1 benefits increased by the *Corbett* judgment?

38. Page 5:13-14: Was "the funding relief in the MP-1 and MP-2 transactions eliminated by the settlement of the [*Gleason*] case" or did underfunding of the pension system remain the subject of litigation, including in *McGuigan* and as a subject of SDCERS' compulsory cross-complaint in this case?

39. Page 6:27-28 and page 7:13: Was the plan that became MP-1 developed solely by "then City Manager Jack McGrory"?

40. Page 7:18-20: Did City officials, who were also members of the SDCERS Board of Directors, participate in the making of the MP-1 and MP-2 benefits by voting as members of the SDCERS board or otherwise participating in the making of MP-1 and MP-2 in connection with the City Council's approval?

41. Page 9:20-28: Is the Court finding that the 1998 MOUs superseded MP-1 and cured any violation of law that occurred in MP-1?

42. Page 14:3-11: Did the SDCERS Board approve MP-2 at the July 11, 2002, meeting, and did any board members vote in favor of the proposal, each of whom were City employees whose retirement benefits were improved by the adoption of the new benefits? Was

the grant of benefit enhancements in MP-2 contingent upon SDCERS approving the funding relief?

43. Page 14:24-28: Did *Gleason I* involve any issue relating to the legality of benefit increases in MP-1 or MP-2 or any issue relating to Gov't Code § 1090?

44. Page 15:20-21: Did the *Gleason* settlement involve pension benefits enacted by the City in MP-1 and MP-2?

45. Page 16:2-4: Is the argument made by the Unions (Intervenors)—that the City (the *Gleason* plaintiffs' adversary) is in privity with the *Gleason* plaintiff the "exact argument" that the City made in *McGuigan,* that the *Gleason* plaintiffs were in privity with Mr. McGuigan (who like the *Gleason* plaintiffs were also a system beneficiary)?

46. Page 16:9: Please confirm that the effective date of the *Corbett* settlement was July 1, 2000, Exhibit 930 at 11:7.

47. Page 16:28: Please confirm that the date of June 30, 2000 used in the *Corbett* settlement referred to benefits (i.e., retirement factors) in effect prior to the *Corbett* settlement.

48. Page 17:6-8: Please confirm that the benefits in effect at the time of the *Corbett* judgment arose under the 1998 MOUs, which themselves incorporated the MP-1 benefits under the 1996-1997 MOUs.

49. Page 18:1-3: In stating that "no special rules of interpretation apply because a governmental entity was a party to the settlement agreement and resulting judgment," is the Court ruling that contract interpretation principles as applied to a governmental entity may override the proscriptions of Gov't Code § 1090?

50. Page 18:14: Please confirm that, although the *Corbett* settlement was approved in May of 2000, its effective date is July 1, 2000, Exhibit 930 at 11:7.

51. Page 18:13-14: Please confirm that the "'retirement calculation factor in effect on June 30, 2000'" refers to pre-*Corbett* settlement benefits.

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52. Page 18:16-17: Please confirm that the pre-*Corbett* settlement benefits under the 1998 MOUs expressly relied upon the benefits granted in the MP-1 MOUs adopted in 1996-1997.

53. Page 18:20-22: The Court's statement that the *Corbett* judgment "clearly uses the benefits in effect as of June 30, 2000, as the basis for the computation of the 'new' *Corbett* benefits" is erroneous in suggesting that there are entirely "new" *Corbett* benefits. Under the *Corbett* settlement, employees retired on or before July 1, 2000 receive a lump sum payment of 7% of their pre-*Corbett* benefits both retroactively and prospectively. Employees who are current employees as of July 1, 2000 are entitled to elect an alternative of either (1) an increase in the amount of 10% of their benefits in effect on June 30, 2000 (which is the pre-*Corbett* amount) or (2) a new increased retirement factor, which is an increase built on the pre-*Corbett* retirement factor amount. Please correct this error in the Court's Proposed Statement of Decision.

54. Page 18:22-26: Please confirm that the following statements are in error: "If the City's interpretation of *Corbett* is correct, one would have to postulate that the parties agreed upon increases of 7% and 10% with no reference point. Taking the City's interpretation to the extreme, the 7% and 10% increases would apply to zero since the underlying benefits are void." The City could settle litigation (which itself had nothing to do with whether MP-1 was void for illegal conflict of interest) by using benefits in place as a baseline for calculations of settlement amounts without waiving its right to challenge the underlying illegality.

55. Page 19:4-7: Please confirm that the Court's decision is in error in stating that portions of the *Corbett* judgment "give current employees an option to take a new increased percentage 'retirement factor' which is stated in terms of a new percentage and not a fractional increase of a percentage." The *Corbett* judgment speaks in terms of an increase, not a new percentage. Exhibit 930 at 13-14 ("Your retirement Calculation factor will be increased from 2.5% . . ."); Exhibit 930 at 8-9 ("Your retirement Calculation factor will be increased from 2.5% . . .")

56. Page 19:7-9: Please explain why "one would have to ignore the fact that the benefits for current workers are based on calculations referring to the June 30, 2000 date" to conclude that the City cannot challenge the MP-1 benefits in light of the *Corbett* settlement. The June 30, 2000 benefits pre-dated the effective date of the settlement (July 1, 2000) and are based on MP-1 amounts.

57. Page 19:11-13: Please explain how the fact that the benefits awarded to those already retired being calculated upon "benefits the retired already were receiving" precludes the City from challenging the MP-1 benefits when the fact that the *Corbett* settlement merely adds to the benefits in place means that the *Corbett* settlement is not reviewing, approving, superseding or replacing the existing illegal benefit structure.

58. Page 19:20-22: Please explain whether in referring to the "cost and economic benefit of the new benefits" the Court is finding that the City was aware of the illegality of the MP-1 benefits in 2000 when it settled *Corbett* and therefore the City intended to waive any violation of Gov't Code § 1090 in settling that case.

59. Page 20:3-5: Please explain whether in stating that "new retirement benefits were created in *Corbett*," the Court is finding that the *Corbett* settlement adopted an entirely new benefit structure or whether *Corbett* built upon the existing structure by adding to the benefits in place.

60. Page 20, n.2: Please confirm that for those employees who retired under MP-1 (prior to the *Corbett* judgment), *Corbett* has no impact on the calculation of their retirement benefits, except to provide them with a 7% retroactive and prospective increase, and their retirement benefits continue to be based upon MP-1.

61. Page 21, n.2: Please confirm that the Court's statement that "the contracts, (the 1996/97 MOUs were fully executed and expired" is erroneous because the City continues to pay retirement benefits under MP-1.

62. Page 21:8-12: Please confirm that SDCERS has not agreed not to participate in Phase III of the trial, in which the legality of the benefits will be litigated.

63. Page 22:1-7: Please confirm that neither the Deputy City Attorneys' Association nor the San Diego Police Officers' Association, nor any individual employee, retiree or beneficiary, has sought to intervene in this litigation.

64. Page 23:7-8: Please confirm whether the Court is finding that the absent parties are not adequately represented by the existing parties.

65. Page 23:10-12: Please confirm that the City has not sought to set aside any particular individual pension benefit in this litigation, but merely seeks a declaration that MP-1 and MP-2 violated state and local conflict of interest and debt limit laws.

66. Page 23:18-19: Please confirm that the Court is holding that the only means by which the City can obtain a declaration of the legality of MP-1 and MP-2 is in a lawsuit in which every single individual pension beneficiary is joined as a party.

67. Page 24:17-18: In stating that "[t]here is also a significant issue as to whether the individual active union members in the MEA, Local 127 and Local 145 are before the court," is the Court finding that those unions do not represent their active members in this case?

68. Page 24:19-22: In stating that the unions have "participated in this action, specifically to enforce their collective bargaining agreements with the City," is the Court finding that the unions did not intervene to litigate the legality of the pension benefits under MP-1 and MP-2?

69. Page 24:23-24: In stating that unions "cannot bargain away nor waive the employees' individual constitutional rights," is the Court ruling that unions cannot be bound by adverse judicial determinations that affect their employees' rights?

70. Page 25:13-5: Does the Court hold that unions do not represent their members in litigation over matters within the scope of their representation?

71. Page 25:13-18: Please confirm that the City is not attempting to impose upon employees or beneficiaries obligations or liability belonging to the unions, nor is the City seeking an *in personam* judgment against any party not named in the lawsuit.

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72. Page 25:23-28: Please explain how the unions do not represent the interests of all employees when the unions are seeking to validate all benefits issued under MP-1 and MP-2.

73. Page 25:16-19: Please explain the risk of inconsistent rulings when the Court's decision on the legality of MP-1 and MP-2 would have preclusive effect in subsequent litigation.

74. Page 27:23-25: Did SDCERS approve the benefit increases that were part of the MP-1 and MP-2 proposals?

75. Page 28:1-3: Is SDCERS a board of the City of San Diego and part of the City?

76. Page 28:7-8: Is the City precluded from suing its own board?

77. Page 28:10-12: Did SDCERS approve the benefit increases that were part of the MP-1 and MP-2 proposals?

78. Page 28:14-17: Did the MP-1 and MP-2 proposals that came before the SDCERS Board for approval include benefit increases as well as funding relief?

79. Page 28:24-26: Did SDCERS enable the benefit increases in MP-1 and MP-2 to occur by approving those proposals when they came before the SDCERS Board?

80. Page 28:28-29:1: Did SDCERS only approve the underfunding portions of MP-1 or MP-2 or did its Board also approve the benefit increases contained in those proposals?

81. Page 29:1-3: Did the *Gleason* settlement resolve all underfunding claims against the City or has the City also been sued for underfunding arising out of MP-1 and MP-2 in *McGuigan* and also by SDCERS in this lawsuit?

82. Page 29:4-6: By finding that "SDCERS does not stand in the shoes of the employees with control over the offending benefit contracts," is the Court finding that SDCERS did not control the creation of unfunded debt in MP-1 and MP-2 with the SDCERS Board's approval of those proposals?

83. Page 29:9-11: In stating that "[t]he portion of both MP-1 and MP-2 that SDCERS had control over (contribution relief) has already been eliminated," is the Court finding that all of the debt created by the underfunding in MP-1 and MP-2 has been satisfied?

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84. Page 29:14-16: In holding that the real parties on the debt limit law claims are not before the Court, is the Court finding that the City should sue the employees who gained under the benefit increases, rather than SDCERS, the body which approved those increases?

85. Page 29:16-18: Does a settlement under which the City pays money to partially restore underfunding that occurred as a result of MP-1 and MP-2 (i.e., the *Gleason* settlement) prevent SDCERS from being liable for creating debt without corresponding revenue in the first instance?

86. Page 32:11-12: Please confirm whether the Court is holding that the City cannot sue SDCERS because the City previously had compulsory cross-claims against the *Gleason* Plaintiffs, which are not the same parties as SDCERS nor are they in privity with SDCERS because they sued SDCERS in the prior *Gleason* litigation.

87. Page 36:9-12: Is the Court rejecting the remedy for violations of Government Code Section 1090 of declaring the governmental action void and remanding the matter back to the City Council for new proceedings?

88. Page 36:12-15: Is the Court finding that the City Council on remand does not have the authority to re-determine benefits and contributions based upon the Court's finding that MP-1 and MP-2 are void, and that a subsequent validating action would not be a basis for subsequent court approval of Council action?

89. Page 36:23-27: The Court incorrectly determined that the City was not seeking to set aside the 2.5% at 55 benefits on a going forward basis on an incorrect reading of the City's interrogatory responses to Special Interrogatory number 434.[33] Both interrogatory responses are conditioned by the statement that such benefits were "paid for." The City clarified its contention with regard to the benefits it was seeking to set aside at trial through the testimony of Joseph Esuchanako, who provided the Court with a detailed statement of the benefits that the City had targeted as falling within those illegally granted in violation of Gov't Code § 1090 and

[33] *See* Exhibit 779, page 68, City's Response to Special Interrogatory 434; Exhibit 1260, page 73, City's Response to Special Interrogatory 434.

automatically disgorged under Gov't Code § 1092.[34] Furthermore, the City has served amended and supplemental responses to special interrogatory numbers 432, 433 and 434 to further clarify the City's position. To further clarify the City's position with regard to the 2.5% at 55 benefits on an ongoing basis, the City is challenging any of these benefits that were not paid for.

The Court did not resolve the City's contention that the terms of the Gleason settlement itself preclude application of res judicata by (1) providing that only the Gleason plaintiffs (not the City) give releases; and (2) providing that the City does not admit liability. Therefore, the City requests the Court find that the terms of the Gleason settlement precludes the application of res judicata to the City's claims.

Dated: December 27, 2006

MICHAEL J. AGUIRRE, City Attorney

By _____
Michael J. Aguirre
City Attorney
Attorneys for Defendants/Cross-Complainants

[34] The City identified the MP-2 benefits it is challenging in the presentation of Mr. Esuchanako's report and his trial testimony. (Exhibit 1446.3 to 1446.4 and November 13, 2006, a.m. trial transcript at 67:6-68:18).